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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

CENTRAL MACHINERY COMPANY, *Appellant,*

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA, *Appellee.*

On Appeal from the Supreme Court of Arizona

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of Arizona

JURISDICTIONAL STATEMENT

Appellant Central Machinery Company appeals from the judgment and opinion of the Supreme Court of Arizona entered in this proceeding on December 4, 1978, rehearing denied, January 23, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 589 P.2d 426 (1978). The opinion of the Superior Court of Arizona for Maricopa County is unreported. Both opinions are reproduced in the appendix to this statement.

JURISDICTION

(i) The proceeding below was a civil action for refund of the Arizona transaction privilege tax imposed pursuant to Ariz. Rev. Stat. 42-1309, 1312, 1361.

(ii) The decision of the Arizona Supreme Court was entered on December 4, 1978. A timely motion for rehearing, as permitted by Arizona law, was denied on January 23, 1979. Appellant's notice of appeal to this Court was filed on April 18, 1979, in the Supreme Court of Arizona.

(iii) Appellant believes this Court has jurisdiction of this appeal pursuant to 28 U.S.C. 1257(2).

(iv) The following cases sustain the jurisdiction:
United States v. *John,* 437 U.S. 634 (1978)

McClanahan v. *Arizona Tax Com'n,* 411 U.S. 164 (1973)

Warren Trading Post Co. v. *Arizona Tax Com'n.,* 380 U.S. 685 (1965)

(v) The validity of Ariz. Rev. Stat. 42-1309, 1312, 1361 as applied is involved. These sections are set out in the appendix to this statement. The federal laws involved are also set out in the appendix.

QUESTION PRESENTED

Did the State of Arizona have jurisdiction to tax the sale of farm machinery by an Arizona corporation to an Indian tribe, where the sale took place within the tribe's reservation and was approved by the Bureau of Indian Affairs Agency Superintendent?

STATEMENT OF THE CASE

The facts were stipulated below and are not in dispute. Appellant Central Machinery Company (CMC) is an Arizona corporation with headquarters at Casa Grande, Arizona. CMC is a John Deere equipment dealer.

The transaction at issue was a sale of farm machinery from CMC to Gila River Farms, a wholly-owned enterprise of the Gila River Indian Community. Gila River Farms raises crops on tribal trust land within the Gila River Indian Reservation in Arizona. CMC solicited the contract of sale within the Reservation, and the contract was made there. Delivery of the machinery and payment also took place within the Reservation. CMC's headquarters at Casa Grande are near the Reservation but outside its boundaries.

CMC did not have a permanent place of business within the Gila River Reservation, nor did it have a federal license to conduct continuous trade with Indians within the Reservation. However, the Superintendent of the Pima Agency of the Bureau of Indian Affairs approved the particular transaction at issue. See 25 U.S.C. 261-64; 25 C.F.R. part 251.

The Gila River Indian Reservation was established in 1859 for those bands of the Pima and Maricopa Tribes whose ancestral lands lay along the Gila River in the Territory of Arizona (then part of New Mexico). Act of Feb. 28, 1859, c. 66, §§ 3-5, 11 Stat. 401 (App. 2a). The tribes have occupied the same locality for many centuries, supporting their members by means of irrigated agriculture according to the Hohokam cultural tradition.[1] The United States has on numerous occasions assisted the Tribes to improve their irrigation capabilities. *E.g.,* 33 Stat. 1081, § 10 (1905).

Arizona statutes impose a "transaction privilege tax" on all sales within the State, determined as a percent-

[1] Federal and State Indian Reservations and Indian Trust Areas 51 (U.S. Dept. of Commerce 1974).

age of the gross sales price. Ariz. Rev. Stat 42-1309, 1312, 1361. If the State has jurisdiction to tax the transaction at issue here, the tax applicable is $2,916.62. CMC charged this amount to Gila River Farms, which paid it to CMC under protest. CMC paid the amount over to the State under protest and initiated the appropriate administrative proceeding under Arizona law to claim a refund. CMC agreed to pay over any amount recovered to Gila River Farms.

The administrative application was denied, and CMC brought this refund action in the Superior Court of Arizona for Maricopa County. That court held that the State had no jurisdiction to tax the transaction and ordered a refund. App. 6a. The Arizona Supreme Court reversed by a vote of four to one. App. 10a.

THE FEDERAL QUESTION IS SUBSTANTIAL AND IMPORTANT

A. The Decision Below Conflicts With Governing Decisions of This Court.

In *Warren Trading Post Co.* v. *Arizona Tax Com'n.*, 380 U.S. 685 (1965), this Court held that Arizona had no jurisdiction to impose its transaction privilege tax on sales of goods to Indians within the Navajo Reservation. As both majority and dissent below recognized, the instant case is very similar. The Arizona taxing statutes are the same (see 380 U.S. at 686 n. 1); in both cases the sellers were Arizona corporations; and in both cases the sales took place within Indian reservations. In *Warren* the buyers were Indians not specifically identified. Here the buyer is a tribal enterprise owned by the Gila River Tribes.

The court below distinguished *Warren* on three grounds. It held that the result in *Warren* depended

on the seller having (1) a permanent place of business on the reservation; and (2) a federal license authorizing continuous trade with the Indians. The court also held as a matter of law that the federal statutes governing trade with Indians did not apply. None of these reasons will withstand analysis.

The federal statutes regulating trade with Indians manifestly apply. 25 U.S.C. 261 specifies that the Commissioner of Indian Affairs has "sole power and authority to appoint traders to the Indian tribes," and 25 U.S.C. 263-64 specify that all trade within reservations is under federal authority. These laws have been interpreted broadly by this and other courts. *Warren, supra; Rockbridge* v. *Lincoln,* 449 F.2d 567 (9th Cir. 1971). There is no basis to imply the exceptions from them apparently created by the court below.

There is nothing in the laws imposing federal control over trade with Indians restricting their scope only to sellers with a permanent place of business within an Indian reservation. 25 U.S.C. 264 penalizes anyone "who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, *or* to introduce goods, or to trade therein" without a federal license (emphasis added). See part B, *infra.* One of the applicable regulations, 25 C.F.R. 251.9(b), expressly refers to "itinerant peddlers" as within the laws. See also 25 C.F.R. 252.3(i). The purported distinction also ignores history. In the early years of our Nation, persons licensed to trade with Indians brought goods to Indian country, exchanged them for furs, and left again. F. Prucha, *American Indian Policy in the Formative Years,* 1790-1834 ch. 5 (Harv. 1962).

Nor is CMC's lack of a federal license authorizing continuous trade an availing distinction. The nature of

CMC's business is such that a permanent retail establishment within the Reservation would not be practicable. The Bureau of Indian Affairs Superintendent authorized this particular sale; he licensed this single transaction rather than authorizing CMC to conduct regular business.

The BIA administrative interpretation of the proper method to license such a transaction is presumptively valid. *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 660 (1976). Also, there was no reason for the court to disapprove the pragmatic decision of the Superintendent. It is hyper-technical to suggest that a general license to sell continuously on the Reservation is necessary to come within the statutes, and licensing of a single transaction does not. It would also be ironic if the sales of retail goods in *Warren* are not taxable, but the sale of farm machinery—involving a much greater tax and relating to the basic economic purpose of the Reservation itself—can be taxed.

This Court has repeatedly held that state taxes which interfere with the purposes for which an Indian reservation was set aside are not valid. In addition to *Warren,* the Court in *United States* v. *Rickert,* 188 U.S. 432 (1903), held invalid a state personal property tax on Indian farm implements and animals located on trust allotments within a reservation. *Rickert* was relied on in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 158-59 (1973), to invalidate a state use tax imposed on goods brought onto an off-reservation tribal ski resort for incorporation into tax-exempt realty.[2] *Cf., Squire* v. *Capoeman,* 351 U.S. 1 (1956).

[2] The Court in *Mescalero* sustained a state gross receipts tax as applied to the ski resort on the ground that it was located outside the Mescalero Apache Indian Reservation.

The court below interpreted the *Warren* decision to be based solely on the court's narrow and technical reading of the federal statutes governing trade with Indians. But in *McClanahan* v. *Arizona Tax Com'n.,* 411 U.S. 164, 175, 180 (1973), this Court expressly relied on *Warren* to invalidate a personal income tax on reservation Indians—a result unrelated to the trading laws or any other specific federal regulation. That decision rather depended on the protection of tribal self-government implicit in federal establishment or recognition of a self-governing Indian reservation. It is obvious that the tax at issue here is more burdensome to the Gila River Tribes than was the tax at issue in *McClanahan* to the Navajo Tribe. This tax directly impacts on a basic function of tribal government and impairs the Tribes' efforts to be self-sufficient.

B. The Decision Below Conflicts With a Decision of the United States Court of Appeals for the Tenth Circuit.

As noted above, the court below held that the federal statutes governing trade with Indians do not apply to a seller lacking a regular place of business on the reservation and lacking a federal license permitting continuous trade with Indians. It therefore directly conflicts with the decision in *United States ex rel. Hornell* v. *One 1976 Chevrolet Station Wagon,* 585 F.2d 978 (10th Cir. 1978). The court there held that an unlicensed and unauthorized sale to reservation Indians came within the statutory prohibition of 25 U.S.C. 264. There as here the sale was a single transaction by a seller without a permanent place of business on the reservation.

CONCLUSION

The decision below is clearly in conflict with this Court's holding in *Warren Trading Post Co.* v. *Arizona Tax Com'n., supra,* and it should be reversed.

Respectfully submitted,

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April 1979

APPENDIX

APPENDIX

A. State Statutes Involved

ARIZONA REVISED STATUTES [3]

§ 42-1309. Levy of tax; purposes; distribution

A. There is levied and there shall be collected by the department for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the schedule as set forth in §§ 42-1310 through 42-1315.

* * *

§ 42-1312. Tangible personal property; exceptions; classification of proceeds; sales to establishments preparing foods for human consumption

A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, but the tax shall not apply to the gross proceeds of sales or gross income from:

[exceptions omitted]

* * *

---

[3] Portions of these sections not relevant to this appeal have been omitted. The sections are shown as in force at the time of the transactions at issue; there have been subsequent amendments.

§ *42-1361. Levy of tax*

A. There is levied and shall be collected by the department of revenue a tax:

1. On the privilege of doing business in this state, measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application, against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the provisions and schedules as set forth in title 42, chapter 8, article 1 [Section 42-1301 et seq.], at rates equal to fifty per cent of the rates imposed in such article.

* * *

B. Federal Statutes Involved

ACT OF FEB. 28, 1859, c. 66, 11 STAT. 388,401

* * *

SEC. 3. *And be it further enacted,* That the President of the United States be, and he hereby is, authorized and required to cause to be surveyed, and the boundaries thereof permanently marked, the tract or tracts of land lying on or near the Gila River, in the Territory of Arizona, New Mexico, now occupied by the confederated bands of Pima and Maricopa Indians, and the sum of one thousand dollars is hereby appropriated to defray the expense of the said survey.

SEC. 4. *And be it further enacted,* That the President of the United States be, and he hereby is, authorized and required to set apart the tract or tracts of land aforesaid as a reservation for the confederated bands of Pimas and Maricopas: *Provided,* That the said reservations shall not exceed one hundred square miles in extent.

SEC. 5. *And be it further enacted,* That the sum of ten thousand dollars is hereby appropriated to enable the Commissioner of Indian Affairs to make suitable presents to the

Pimas and Maricopas, in acknowledgment of their loyalty to this government and the many kindnesses heretofore rendered by them to our citizens.

UNITED STATES CODE TITLE 25

§ *261. Power to appoint traders with Indians*

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

§ *262. Persons permitted to trade with Indians*

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

§ *263. Prohibition of trade by President*

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licensees to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

§ *264. Trading without license; white persons as clerks*

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any

Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

C. Opinions Below

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. C 297870

CENTRAL MACHINERY COMPANY, *Plaintiff*,

v.

STATE OF ARIZONA, STATE TAX COMMISSION OF ARIZONA,
Defendants.

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

This cause having been heard by the Court on a stipulation of facts, and the Court having considered the second agreed statement of facts, and the arguments and memoranda of counsel,

IT IS ORDERED finding in favor of Plaintiff and against the Defendant.

The stipulated facts disclose that Plaintiff is not a licensed Indian trader and has no office or premises on the Gila Indian Reservation. The sale in question involving

certain tractors was made by Plaintiff to a Gila River Indian agency F.O.B. on the Reservation and pursuant to negotiations conducted on the Reservation.

Plaintiff collected from the Indian purchaser of the tractors the amount of Arizona's transaction privilege tax and has agreed to refund the amount of the tax to the Indian purchaser if this suit by Plaintiff is successful.

Congress has pre-empted the area of Indian commerce by enactment of Title 25, U.S. Code, and the accompanying regulations in 25 Code of Federal Regulations. *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965). Certain state laws have been permitted to apply to activities on Indian Reservations where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations. *Warren Trading Post* v. *Arizona Tax Commission,* supra.

The *Warren Trading Post* case held that the assessment and collection of the Arizona transaction privilege tax on sales made on the Reservation by a licensed Indian trader would frustrate the Congressional purpose of assuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations. The Court stated at 380 U.S., p. 690, 85 S.Ct., p. 1245 that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." See also *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, S. Ct. 1257, 36 L.Ed. 2d 129 (1973).

25 U.S.C. § 261 provides that "The Commissioner of the Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quality of goods and the prices at which such goods shall be sold to the Indians."

25 C.F.R. § 251.9(b) provides for the method of application for license as an Indian trader and provides the method for licensing both permanent traders with premises on the reservation and for itinerant traders for occasional sales.

The stipulated facts do not specify the reasons why Plaintiff did not possess a license as an itinerant trader at the time of the sale in question. The Defendant Department of Revenue argues that the *Warren Trading Post* case should not apply to the extent that Plaintiff or the Bureau of Indian Affairs has failed to comply with the licensing requirements. However, the Supreme Court holding in *Warren Trading Post* rests on the all-inclusive federal regulatory scheme. Nowhere do the federal statutes and regulations indicate that non-compliance by a trader or the Bureau of Indian Affairs will allow imposition of state laws which would otherwise be inapplicable. It is the *existence* of the federal laws and accompanying regulations and not their *enforcement* which pre-empts the State's ability to tax the transaction in question.

Accordingly, IT IS ORDERED finding in favor of Plaintiff and against the Defendant in the amount of $2,916.62, plus costs and interest on said sums at the legal rate from date of judgment until paid.

ENTERED this 31st day of August, 1976.

/s/ Sandra D. O'Connor
JUDGE SANDRA D. O'CONNOR

589 Pacific Reporter, 2d Series

STATE OF ARIZONA, STATE TAX COMMISSION OF ARIZONA,
Appellant,

v.

CENTRAL MACHINERY COMPANY, an Arizona Corporation,
Appellee.

No. 13593.

Supreme Court of Arizona,
In Banc.

Dec. 4, 1978.

Rehearing Denied Jan. 23, 1979.

STRUCKMEYER, Vice Chief Justice.

This appeal rises out of an action brought by the Central Machinery Company for a refund of sales taxes in the amount of $2,916.62, paid under protest. The Superior Court of Maricopa County entered judgment in favor of Central Machinery, and this appeal followed. Judgment reversed.

The parties in their second agreed statement stipulated to these facts: Central Machinery is an Arizona corporation and maintains an office in Casa Grande, Arizona, which is not on an Indian reservation. In 1973, agents of Central Machinery went onto the nearby Gila River Indian Reservation to solicit the sale of farm machinery from the Gila River Farms, an enterprise of the Gila River Indian Community. The Gila River Indian Community is an Indian Entity existing under the authority of 48 Stat. 984, 25 U.S.C. 461, et seq. After a period of negotiation, Gila River Farms executed a purchase order for eleven John Deere tractors at a total price of $100,137.26. An item of $2,916.62, Arizona's Transaction Privilege Tax, was included in the total purchase price. Delivery of the tractors was made

by the John Deere Company to Central Machinery in Casa Grande, Arizona. Central Machinery, after servicing the tractors, delivered them to the Gila River Farms on the Indian reservation at Sacaton, Arizona. Central Machinery did not possess a federal license to trade on any Indian reservation and, although it could have been excluded from the solicitation of business on the reservation by the Superintendent of the Pima Indian Agency, the Bureau of Indian Affairs gave permission to Central Machinery to sell the tractors to the Gila River Farms. The purchase order provides for delivery of the tractors F.O.B. Sacaton. Payment to Central Machinery was by check delivered on the Gila River Indian Reservation. Central Machinery, if it recovers in this action, will remit the amount of the recovery to Gila River Farms.

In the court below, on summary motion, a judgment in favor of Central Machinery was entered. The trial court felt, and so stated that the decision in *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed2d 165 (1965), prohibited this tax. But we do not think so.

In *Warren*, Arizona attempted to levy a tax upon the gross proceeds of sales of the Warren Trading Post Company. The company did a retail trading business with Indians on the Navajo Indian Reservation under a license granted by the United States Commissioner of Indian Affairs pursuant to 19 Stat. 200, 25 U.S.C. § 261 (1958 ed.). The United States Supreme Court decision pointed out that the federal government had comprehensively regulated Indian traders and that existing statutes made specific restrictions on trade with the Indians. Under authority of Congress's Acts, the Commissioner of Indian Affairs had promulgated detailed regulations "prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; * * * conditions under which government employees may trade with Indians; articles that cannot be

sold to Indians; and conduct forbidden on a licensed trader's premises." The opinion concluded:

> "These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."

The Court also said:

> "We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon *Indian traders* for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." (Emphasis added.)

It is clear that *Warren* was decided on the theory of federal preemption. It is also clear that by the use of the words "Indian traders" the Court meant a defined group of persons licensed under authority of the United States states statutes to carry on the business of trading on Indian reservations with Indians.

This case is clearly distinguishable. Central Machinery is not an "Indian trader", although it may on occasions do business with reservation Indians, even to the extent of going on the reservation to solicit business. Since Central Machinery is not an Indian trader within the meaning of *Warren* and since this transaction has not run afoul of any congressional enactments passed to protect and guard its Indian wards, we do not find a federal preemption which would forbid the imposition of this tax.

The foregoing it sufficient to settle the dispute in this case. However, Central Machinery seems to be asserting

that because the economic burden of the tax falls upon the Indians, it is somehow immune from the imposition of the tax. As to this, it has been repeatedly held that where the economic burden falls is not the controlling factor. *Fort Mohave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976); *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied* 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972), *rehearing denied* 405 U.S. 1033, 92 S.Ct. 1280, 31 L.Ed.2d 491 (1972), *motion for leave to file second petition for rehearing denied*, 409 U.S. 901, 93 S.Ct. 94, 34 L.Ed.2d 163 (1972); *G. M. Shupe, Inc.* v. *Bureau of Revenue*, 89 N.M. 265, 550 P.2d 277 (1976).

The factors controlling the imposition of a state tax have recently been set forth in *Moe* v. *Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976):

> "We see nothing in this burden which frustrates tribal self-government, see *Williams* v. *Lee*, 358 U.S. 217, 219-220, 79 S.Ct. 268, 270, 3 L.Ed.2d 251, 253 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, *United States* v. *McGowan*, 302 U.S. 535, 539, 58 S.Ct. 286, 288, 82 L. Ed. 410, 413 (1938). 'Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments.'" *Id.* at 483, 96 S.Ct. at 1646.

No claim is made that Arizona's tax conflicts with any enactment of the federal government passed to protect and guard its Indian wards.

Judgment of the Superior Court reversed.

CAMERON, C. J., and HAYS and HOLOHAN, JJ., concurring.

GORDON, *Justice* (dissenting):

I must dissent from the majority opinion, because it distinguishes *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed2d 165 (1965) from the facts of this case. I believe that *Warren, supra,* controls and prohibits the imposition of the tax in question.

In both *Warren, supra,* and in this case, the vendors are non-Indians making sales to Indians on reservation land. The tax in dispute in both cases is the same, and in both, although the non-Indian seller is legally required to pay the tax, the economic impact is borne by the Indian buyer. The tax was invalidated in *Warren* but is upheld here. Only two meaningful differences exist between the cases: Central Machinery did not maintain a permanent place of business on the reservation and did not possess a trader's license. Neither of these differences merits the outcome of the majority opinion.

CENTRAL MACHINERY'S LACK OF A PERMANENT PLACE OF BUSINESS

Volume 25 C.F.R. § 251.9(b) provides for the licensing of "[i]tinerant peddlers * * as traders." Peddler is defined in 25 C.F.R. § 252.3(i) as "a person who offers goods for sale within the exterior boundaries of the Hopi, Navajo or Zuni Reservations, but does not do business from a fixed location or site on any of those reservations." Section 252 deals with business practices on the Navajo, Hopi, and Zuni reservations and, therefore, is not binding on this case. Its definitional section, however, can reasonably be consulted to construe § 251, which it without such a definitional aid. It would be illogical to believe that the term "peddler" in each of these parts refers to different types of people. The obvious purpose of sections 251 and 252 is to protect the reservation Indians from unscrupulous vendors, whether they be based on the reservation or off. Central Machinery's lack of a permanent place of business on the reservation is not fatal, therefore, to its claim that

it should be granted the tax preference extended to Indian traders. A peddler can be licensed as a trader. This issue was raised and briefed by the parties, but is not discussed in the majority opinion.

Central Machinery's Lack of a Trader's License

Central Machinery sold tractors to Gila River Farms without first being licensed pursuant to 25 C.F.R. § 251.9 (b), which requires that such a license or permit be obtained from the Superintendent of the Pima Agency, the Bureau of Indian Affairs agency supervising the reservation. Approval, therefore, was obtained from the very person authorized to grant a license.

It is unclear from the record why a license or permit was not obtained. To penalize the Indian purchaser because the specific licensing procedure was not followed is illogical in light of the Bureau of Indian Affairs' knowledge and approval of the transaction. The license requirement is for the protection of Indians. *Warren, supra.* Sanctions for violation of the licensing regulations include forfeiture of all merchandise offered for sale and a fine of $500.00. 25 C.F.R. § 251.3. The penalty is to punish the trader, not the Indian. If Central Machinery's failure to have a license were to remove this case from the protection of *Warren,* the result would compel the Indians to pay economic sanctions to Arizona because of the Bureau of Indian Affairs' failure to enforce its regulations. As the trial court's opinion stated, "Nowhere do the federal statutes and regulations indicate that non-compliance by a trader or the Bureau of Indian Affairs will allow imposition of state laws which would otherwise be inapplicable. It is the existence of the federal laws and accompanying regulations and not their enforcement which preempts the State's ability to tax the transaction in question."

Economic Impact

The majority opinion concludes that the tax in question is not barred, because it is imposed on the seller, Central Machinery, and not on the Indian buyer. *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968), however, held that in questions of immunity, the Supreme Court is not bound by a state court's characterization of a tax. There a state sales tax was levied against the seller but passed on to the purchaser. The purchaser was a federal bank, and, like the Gila Indians, was immune from tax. The Supreme Court ignored the state's contention that the tax was not on the bank and found it impermissible. In *Warren, supra,* the Supreme Court has already addressed the status of the tax in question and held it to be impermissible when levied against Indian traders.

Furthermore, I believe the facts in this case show that the financial impact of Arizona's tax falls directly on the Indians as passed on by the vendor and that the cases dealing with taxation of Indians *do* focus on economic impact. This in fact appears to be the decisive factor in determining if a tax will be upheld, In *G. M. Shupe, Inc.* v. *Bureau of Revenue,* 89 N.M. 265, 550, P.2d 277 (1976), a corporation constructing a dam on reservation land for the Department of the Interior was not exempt from state tax. The activity was merely on Indian lands, and the tribe would suffer no direct effect because of the tax. In *Fort Mohave Tribe* v. *County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), non-Indians leasing Indian land had to pay a tax on the land. Although this might have had an indirect effect on the Indians' bargaining power, the direct result was to give the non-Indian leasee a more attractive investment. In *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) an Indian selling cigarettes on the reservation was required to pay a sales tax on cigarettes sold to non-Indians,

but not on cigarettes sold to other Indians. Although the Indian vendor argued that he would suffer an out-of-pocket loss, the only certainty was that the non-Indian buyer would benefit. The effect on the Indian seller was too indirect.

In none of the cases in which a tax is upheld is an Indian the consumer who is directly hit. The direct impact is on the non-Indian, and the effect on the Indian is to some degree speculative. In *Warren, supra,* and in this case, it is the Indian consumer who must directly bear the burden. The subsequent case law is not on inroad on *Warren,* which still controls this issue and renders the tax imposed on Central Machinery illegal.

I must, therefore, respectfully dissent.

D. Denial of Rehearing

(Same Caption as Above)

The following action was taken by the Supreme Court of the State of Arizona on January 23, 1979 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing—DENIED."

Justice Frank X. Gordon, Jr. voted to grant.

Mandate enclosed herewith.

CLIFFORD H. WARD, *Clerk*
By /s/ DIANA K. BENTLEY, *Deputy Clerk*

E. Notice of Appeal (Filed April 18, 1979)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 13593

STATE OF ARIZONA, STATE TAX COMMISSION OF ARIZONA,
Appellant,

v.

CENTRAL MACHINERY COMPANY, an Arizona corporation,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Central Machinery Corp., plaintiff-appellee above named, hereby appeals to the Supreme Court of the United States from the judgment and opinion of this Court entered on December 4, 1978, and the denial of rehearing on January 23, 1979.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Respectfully submitted,

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